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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Annual Assessment of the Status of)
Competition in Markets for the)
Delivery of Video Programming)

CS Docket No. 98-102

**COMMENTS OF
RCN TELECOM SERVICES, INC.**

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SUMMARY

RCN Telecom Services, Inc. ("RCN"), one of the leading investors in the open video system ("OVS") concept adopted in Sections 651 through 653 of the Telecommunications Act of 1996 Act, submits these Comments in the Commission's annual assessment of the state of competition in the multichannel video programming distribution ("MVPD") industry. Cable operators remain overwhelmingly dominant in the MVPD marketplace. RCN urges the Commission to take a more pro-competitive role in assuring that the Congressionally-mandated OVS option is allowed to succeed (or fail) on the basis of its own economics, rather than be delayed or crippled by the steady and worsening anticompetitive campaign of the entrenched cable industry. RCN's experiences over the last year demonstrate the need for more focused and active Commission participation in establishing and supervising the ground rules.

Although the Commission's Notice of Inquiry ("NOI") seeks comment on a wide variety of competitive issues concerning the video programming industry, RCN will confine these comments to the progress it has made and the difficulties it has faced in bringing to fruition Congress's vision of a new mode of competitive facilities-based video distribution. RCN is certified to operate OVS systems covering the metropolitan areas of Boston, New York, Philadelphia, Washington, D.C. and San Francisco, CA., and recently applied for authority to operate in northern New Jersey. Currently, two such systems are in operation, one in the Boston area through an affiliation with an unregulated subsidiary of the Boston Edison Co. and one in New York City. To the best of its knowledge, RCN's business plan is unique in at least two respects: (1) RCN uses modern fiber optic plant to offer its subscribers a bundled package of local and long distance telephone, high speed Internet access, and multichannel video

distribution; and (2) RCN primarily targets the residential market rather than the larger business market.

RCN's capital budget through 1999 is approximately \$850 million. It currently has some 50,000 customers, of whom about 10,000 are receiving video services distributed on RCN's fiber optic lines with the remainder temporarily receiving service via microwave.

RCN's entry into the telecommunications marketplace is robust, focused, and well-financed. Nevertheless, the cable industry's pervasive and constant anticompetitive campaign, conducted principally by Time Warner Cable Co. and Cablevision Systems Corp., is a source of continuing concern and something that must be brought to the Commission's attention. Both Time Warner and Cablevision are competitors of RCN in the Boston and New York markets. Their market presence, financial resources, and access to vital programming vastly exceed that of RCN. Yet, both of these companies have gone to great lengths to abort RCN's OVS initiatives.

First, for example, both have attempted to derail RCN's efforts in Boston by filing a seemingly unending stream of administrative objections to RCN's Boston area OVS system. Second, Cablevision has failed to comply with the Commission's inside wiring regulations by refusing to cooperate with RCN in the transfer of subscribers' service from Cablevision to RCN in multiple dwelling unit buildings ("MDUs"), which form the heart of the MVPD market in Boston. Rather, Cablevision has adopted the wholly unrealistic position that RCN must bore through sheet rock in order to connect its service to subscribers, even though the inside wiring rules specify that such destruction should not be necessary and the multiple dwelling unit ("MDU") managers have denied RCN permission to do so.

Third, in the guise of potential video program providers, both Time Warner and Cablevision, each of which are competing, in-region cable operators within RCN's OVS region,

have sought access to proprietary and confidential data regarding RCN's OVS system, even though the Commission's OVS rules allow an OVS operator to deny such access. Moreover, seemingly not content with attacking RCN directly, it appears that both Time Warner and Cablevision have arranged for other cable industry elements to file objections to RCN's OVS applications. In both such cases, the Cable Services Bureau rightly rejected these attacks.

There are other systemic difficulties to which the Commission must pay careful attention if it wishes to see OVS succeed. RCN has observed that many local governments have attempted to charge OVS operators excessive fees or impose discriminatory conditions in exchange for the use of the public rights-of-way. These efforts, if imposed, would violate the broad prohibition in Section 253 of the 1996 Act barring local regulators from erecting barriers to new telecommunications competition. RCN urges the Commission to be alert to this looming obstacle to facilities-based competition and prepare to preempt state or local requirements, where appropriate.

If the Commission wishes to see OVS succeed as a viable element of the video marketplace, it must carefully consider the competitive circumstances – especially the regulatory regime – in which such competition must take root. In particular, given the tremendous advantages in market presence and vertical integration enjoyed by RCN's larger competitors, the Commission must take care to thoughtfully and meaningfully supervise the regulatory aspects of the OVS industry.

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**COMMENTS OF
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RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, herewith respectfully submits its Comments in response to the Federal Communications Commission's ("Commission") Notice of Inquiry ("NOI") in the above-captioned matter.¹ RCN welcomes the opportunity to participate in the Commission's annual assessment of the state of competition in the video marketplace.² As set forth below, RCN urges the Commission to play a more active role in fostering competition in the evolving multichannel video programming distribution ("MVPD") industry, particularly with respect to the efforts of the incumbent cable industry to impede facilities-based competition from operators of open video systems ("OVS").

¹ *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Notice of Inquiry, CS Docket No. 98-102, FCC 98-137, *rel.* June 26, 1998 ("NOI").

² 47 U.S.C. § 548(g).

I. INTRODUCTION

RCN, alone and through various affiliations, is a facilities-based competitive provider of local exchange and long distance telephone services, high-speed Internet access, and traditional franchised cable and/or OVS services, primarily to residential subscribers. RCN employs a variety of technologies to offer these services in direct competition with many of the nation's largest, most well-established telephone and cable incumbents.

At the time Congress enacted the Telecommunications Act of 1996 (the "1996 Act"),³ many of these large incumbents promised their rapid expansion into new telecommunications markets. However, few have made significant headway to date; in particular, incumbent local exchange carriers ("ILECs") largely have abandoned their efforts to offer competitive video programming. RCN, on the other hand, which does not even enjoy an incumbent monopoly position in one market from which to launch a competitive service in other industry segments, has made significant strides towards making the pro-competitive goals of the 1996 Act a reality. Specifically, RCN is by far the largest investor in the OVS concept.⁴ Alone and together with various affiliates, RCN is currently certified to provide OVS services in the metropolitan areas of

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁴ 47 U.S.C. §§ 573-575.

Boston, MA,⁵ New York City,⁶ Washington, D.C.,⁷ San Francisco, CA,⁸ and Philadelphia, PA.⁹ RCN also recently applied for certification to operate an OVS system in northern New Jersey.¹⁰ RCN offers video programming via OVS platforms currently in portions of New York City and Boston and will offer OVS services in a number of surrounding communities in the next few months.

These comments are offered from the perspective of an emerging entrant into video markets which faces pervasive and increasingly intense anticompetitive obstacles raised by the entrenched cable industry. As described below, RCN believes that the Commission must take a more active role in fostering OVS if Congress's vision for facilities-based competition to the incumbent cable monopoly is to be fulfilled.

⁵ *Memorandum Opinion & Order, RCN-BeCoCom-BETG, LLC, Certification to Operate an Open Video System*, 12 FCC Rcd 2480 (1997). RCN-BeCoCom, LLC is an enterprise which is 51% owned by RCN Corporation and 49% by BeCoCom, an unregulated subsidiary of the Boston Edison Company.

⁶ *Memorandum Opinion & Order, Residential Communications Network of New York, Inc. Certification to Operate an Open Video System*, 12 FCC Rcd 2477 (1997).

⁷ *Memorandum Opinion & Order, Starpower Communications, LLC, Certification to Operate an Open Video System*, 13 FCC Rcd 2169 (1998). Starpower is an enterprise jointly owned by RCN and an unregulated subsidiary of the Potomac Electric Power Company.

⁸ *Memorandum Opinion & Order, RCN Telecom Services of California, Inc., Certification to Operate an Open Video System*, DA 98-1158, rel. June 15, 1998.

⁹ *Memorandum Opinion & Order, RCN Telecom Services of Philadelphia, Inc., Certification to Operate an Open Video System*, DA 98-1155, rel. June 15, 1998.

¹⁰ *RCN Telecom Services of New Jersey, Inc. Files an Application for Open Video System Certification for Northern New Jersey*, Public Notice. DA 98-1489 (July 24, 1998).

II. BACKGROUND

RCN will not burden the record by recounting the genesis of the OVS industry.¹¹ To provide a more complete record, however, the following briefly describes RCN's telecommunications offerings, and in particular its facilities-based video programming services. Together with its corporate parent, RCN Corporation, RCN's capital budget in 1998 and 1999 for all of its telecommunications activities will be approximately \$850 million. RCN has approximately 658,000 subscriber connections delivered through a variety of owned and leased facilities.¹² RCN's business plan emphasizes the residential market and is structured to offer consumers a combination of local exchange and long distance telephone service, high-speed Internet access, and traditional cable or OVS services in one bundled offering. Generally, RCN offers these services, both in a package or individually, at rates lower than RCN's competitors.¹³

With respect to video programming, RCN currently offers OVS services in portions of Manhattan and Boston, and will do so in two Boston suburbs (Arlington and Newton) in a few months. In addition, RCN expects to sign an OVS agreement with the local representative of Waltham, MA in the coming weeks. RCN deploys fiber optic cable except in special situations

¹¹ See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, CS Docket No. 97-141, 13 FCC Rcd 1034 (1998) ("1997 Competition Report").

¹² A "connection" for this purpose is a unit of service, such as a local telephone line, Internet customer, or a video services customer. As of March 31, 1998, RCN had approximately 15,600 subscribers to its OVS service, approximately 40,860 connections attributable to its wireless video systems and approximately 187,000 connections attributable to its traditional cable systems.

¹³ For example, RCN's competitive local exchange service is generally priced 5% less than the incumbent local exchange carriers.

in Manhattan where RCN delivers its video services by microwave on an interim basis until fiber optic cable can be deployed there. The systems are designed for analog transmission although the company plans to migrate to digital as soon as the economics of doing so become more attractive. RCN offers a full line-up of up to 110 channels of high quality basic, premium and pay-per-view video programming.¹⁴ As demonstrated in the representative rate comparisons contained in Exhibit A hereto, RCN's video offerings are superior and less expensive than that of the incumbents.

RCN's OVS certification for the Boston-area encompasses the City of Boston and more than 40 surrounding communities.¹⁵ RCN currently provides service to some 8,500 subscribers in the City of Boston and will do so shortly to additional customers in Newton and Arlington. While some of these subscribers take only OVS service, most take the three-way combination of voice, video and data. RCN's major competitors in the Boston-area market are Time Warner Cable Co., which serves approximately 270,000 subscribers,¹⁶ Cablevision Systems Corp., with approximately 345,000,¹⁷ and MediaOne, Inc., with approximately 199,000 subscribers. Combined, these incumbents serve the large majority of the households in RCN's service area.

¹⁴ RCN also offers the latest "impulse" technology which allows convenient impulse pay-per-view ordering of movies and special events using a customer's remote control.

¹⁵ Subsequently, to fulfill the preferences of local regulators, RCN secured traditional cable franchise agreements in a number of these communities, including Somerville and Framingham, and expects to negotiate franchises in additional municipalities.

¹⁶ See www.pathfinder.com/corp/fhook/fbcable.html.

¹⁷ See www.cablevision.com/cvhome/cvabout/finance.html.

In New York City, RCN provides video programming service to over 40,000 subscribers located primarily in Manhattan and recently has agreed with municipal regulators to expand its services into the other boroughs. At present, RCN delivers its offerings largely over microwave facilities acquired from a predecessor in interest, but is actively planning and installing fiber optic distribution facilities. RCN's competitors in New York include Time Warner in Manhattan and Cablevision in other boroughs and in New York City suburbs.

In both of these markets RCN has encountered anticompetitive tactics by the incumbent cable operators designed to thwart RCN's efforts to provide a competitive service or to make doing so unnecessarily expensive or time-consuming. RCN also has experienced an orchestrated campaign by two of the incumbent franchisees in the Boston market that has included almost every conceivable legal and regulatory device to block its path. RCN does not expect entrenched monopolists to welcome competition. This would be contrary to all prior experience and is simply unrealistic.¹⁸ On the other hand, the questions posed in the NOI compel RCN to provide the Commission with a candid picture of the state of facilities-based video competition in these markets, and to suggest specific areas where the Commission could, by developing new or enforcing existing policies or rules, advance the 1996 Act's goal of introducing competition into this historically monopolistic industry.

¹⁸ See *Predation In Local Cable TV Markets*, Antitrust Bulletin, 9/1/95 by T.W. Hazlett: "Cable television operators pursue a predictable set of reactions... to a potential CATV entrant... beginning with a vigorous lobbying campaign to deny entry rights... selective price cutting, preemptively remarketing the first submarkets to be competitively wired... tying up cable network programming... delaying access to ... poles and/or underground conduits... and creating customer confusion...." *Id.* at 11.

III. COMMENTS

A. The Cable Industry Continues to Dominate the MVPD Marketplace

The Commission seeks comment on the status of OVS competition.¹⁹ The Commission does not need to be persuaded that competition in the video marketplace is both desirable and necessary. The continuous increase in customers' cable rates, typically well in excess of inflation, is a constant topic of concern.²⁰ The Commission should be aware, however, that RCN's entrance into certain markets has caused cable operators to exercise dramatic restraint. For example, in late 1997, Time Warner announced that new rate increases in the range of 10% to 15% would take effect throughout the Boston area,²¹ except in Somerville, where RCN provides the first competitive cable service in Massachusetts and one of the first such services in the country.²² Similarly, in the City of Boston, Cablevision raised its rates only 2.5%. In New

¹⁹ NOI at ¶ 4.

²⁰ See, e.g., Communications Daily, July 15, 1998, p. 2, reporting recently released CPI data showing cable rate increases of 7.3% over the previous 12 months as compared with a 1.7% inflation rate. Cablevision's own Internet homepage show an increase in the recurring average monthly revenue per subscriber from \$38.53 in December 1997 to \$41.65 in March 1998, or an increase of more than 8% (<http://www.cablevision.com/cvhome/cvabout/finance.htm>). See also Letter from the Utility Consumers' Action Network to the Honorable Senator John McCain, July 23, 1998, reporting cable rates increases from 1996 to 1998 for: Cox (65% for basic); Southeastern (21% for expanded basic); and Daniels (25% for expanded basic).

²¹ *Boston Globe*, December 21, 1997 (WL 6286769).

²² *Boston Globe*, November 26, 1997 (WL 6282146). In fact, a cable company executive stated that the company is "looking at a whole new competitive pricing system" and "facing how we deal in a competitive environment for the first time." See also *En Banc* Presentation on the Status of Competition in the Multichannel Video Industry, December 18, 1997, at pp.24-30. In Somerville, as in a few other municipalities, RCN offers video programming as a traditional franchised cable operator to fulfill the preferences of local regulators.

York City, Time Warner has implemented an aggressive bulk discount program in many of the multiple dwelling unit buildings ("MDUs") where RCN offers competitive video programming.²³

In the 1997 Competition Report, the Commission sought comments on the clustering of cable ownership.²⁴ Recently, Cablevision acquired 845,000 subscribers from Tele-Communications, Inc. ("TCI") in the New York area.²⁵ As a direct competitor of Cablevision in New York, RCN is alarmed at this latest development. Cablevision is the sixth largest cable operator in the United States with approximately 3.37 million subscribers.²⁶ Prior to the Cablevision/TCI acquisition, Cablevision had approximately 440,000 subscribers in the Bronx and Brooklyn and 50,000 in Yonkers. Cablevision serves about 200,000 subscribers in Connecticut and has entered into arrangements to acquire an additional 250,000 Connecticut subscribers from TCI,²⁷ bringing Cablevision's subscribership in the New York-Connecticut area

²³ Attached hereto as Exhibit B is a sampling of representative articles from the Boston area describing some of the responses by the incumbent cable operators to RCN's entrance into the market.

²⁴ 1997 Competition Report at ¶¶ 140-153.

²⁵ In exchange for its New York area subscribers and some additional subscribers elsewhere, TCI acquired a 33% equity interest in Cablevision.

²⁶ 1997 Competition Report at ¶ 197 and Table E-3. These references fail to reflect Cablevision's recent acquisition of additional subscribers from TCI in the New York area and elsewhere. The 3.37 million figure is taken from Cablevision's Internet homepage, where Cablevision itself reports the acquisition of 829,000 TCI subscribers.

²⁷ Cablevision Press Release dated January 27, 1998. To RCN's knowledge, this proposed acquisition has not yet been submitted to the Connecticut Department of Public Utility Control for approval.

to more than 2.6 million cable customers, or the largest cable cluster in the nation.²⁸ Cablevision also owns one of the largest program suppliers in the nation, Rainbow Programming, L.P., and a controlling interest in Madison Square Garden, L.P. ("MSG"), which includes the arena complex, two professional New York sports teams, and Radio City Productions,²⁹ and the MSG channel, which reaches some 5 million subscribers.³⁰ As a vertically integrated entity from top to bottom,³¹ Cablevision by any measure is a major factor in the New York-area MVPD marketplace and has the ability to significantly impede competition in that market.

Nevertheless, the Federal Trade Commission ("FTC") decided to permit the Cablevision/TCI acquisition.³² In fact, the FTC concluded that the proposed acquisition would be anticompetitive without the parties' agreement to minor cable divestitures.³³ The FTC's decision concerning the Cablevision/TCI acquisition observes that the FTC does not consider multichannel video programming technologies other than cable television, *e.g.*, direct broadcast satellite and wireless cable, to be part of the relevant market for antitrust analysis because "they

²⁸ The same figure is quoted in Cablevision's description of the acquisition on its Internet homepage; *see also* 1997 Competition Report at ¶ 85.

²⁹ *See* Cablevision News Release of Dec. 3, 1997. Rainbow Media Holdings, Inc. and Fox/Liberty Networks have formed a national sports programming venture which will reach 55 million homes. Cablevision News Release dated June 23, 1997.

³⁰ New York Times News Service, Friday, March 20, 1998 (WL-NYT 9807901206).

³¹ Cablevision thus owns the arena (Madison Square Garden), the program content (the Knicks and Rangers), program services (MSG and Sports Channel Networks) and the cable systems transmitting the content. *See* 1997 Competition Report at ¶ 93.

³² *In the Matter of Cablevision Systems Corporation*, File No. 971-0095, 63 FR 5545 (1998) ("FTC Notice")

³³ *Id.*

do not have a significant price-constraining effect on the prices charged by cable operators to subscribers."³⁴ Thus, the FTC deemed irrelevant the interactions among Cablevision and other MVPDs in the New York City area market. Indeed, OVS is not even mentioned.

B. RCN Faces An Unrelenting Campaign of Anticompetitive Tactics From Incumbent Franchised Cable Operators

1. Anticompetitive Actions

As described above, the large majority of Cablevision's subscribers reside in the two markets – New York City and Boston – where RCN is attempting to provide competitive video programming.³⁵ The Commission should be aware that, for a start-up company such as RCN to have any chance of successfully implementing Congress's vision of competition, RCN must overcome a series of daunting challenges. Chief among these are substantial investment which RCN willingly accepts, including the extremely expensive deployment and maintenance of plant and the need to secure vital programming. It is the other unexpected obstacles that have added to RCN's burden; that is, the orchestrated campaign of anticompetitive pressures from the incumbent cable operators. Cablevision, for one, has responded to its first significant competition in part by engaging in a series of anticompetitive initiatives, including:

- (i) Over a period of months, actively obstructing RCN's efforts in New York to return the Cablevision set-top boxes of RCN's newly-acquired subscribers to get refunds for such customers;

³⁴ FTC Notice at III.

³⁵ Approximately 3.27 million of Cablevision's total subscribership of 3.37 million are located in these two urban areas and in the Cleveland, OH market.

- (ii) Filing a petition in an attempt to block RCN's OVS service in Boston on the grounds that the service was unlawful because it was not pursuant to a cable franchise agreement. The U.S. District Court subsequently upheld RCN's right to operate in Boston pursuant to Commission authority;³⁶
- (iii) Unlawfully denying vital programming to RCN in the Boston market for many months. Only after RCN filed a formal complaint at the Commission were the parties able to negotiate the terms and conditions for RCN's access to crucial programming;³⁷
- (iv) Initiating a formal adjudicatory proceeding at the Commission in an effort to gain access to proprietary and competitively sensitive data concerning RCN's Boston OVS system, even though the Commission's rules permit an OVS operator to decline to disclose such information to an in-region cable operator;³⁸
- (v) Intervening in a formal complaint at the FCC brought by Time Warner Cable against RCN in a similar effort to gain access to RCN's OVS data;³⁹

³⁶ *Residential Communications Network of Massachusetts, Inc., et al v. Commonwealth of Massachusetts, et al.*, (D. Mass, Case No. 96-10881-RGS.) The RCN activity which was contested in this proceeding was a video dialtone service.

³⁷ *Interface Communications Group, Inc., Digital Broadband Applications Corp., and RCN v. Cablevision Systems Corp., Rainbow Program Holdings Inc. and American Movie Classics Co.*, 12 FCC Rcd 6052 (1997). Indeed, Cablevision has been involved in numerous program access complaints: *Bell Atlantic Video Services Company v. Rainbow Programming Holdings, Inc. and Cablevision Systems Corporation*, Order, 12 FCC Rcd 9892 (CSB 1997) (The Cable Bureau found that Rainbow discriminated against BVS in the sale of satellite video programming); *Corporate Media Partners d/b/a Americast and Ameritech New Media, Inc. v. Rainbow Property Holdings, Inc.*; Order, DA 97-2040 (rel. Sept. 23, 1997) (Granting the complaint with respect to price discrimination and discrimination in marketing requirements); *EchoStar Communications Corporation v. Rainbow Media Holdings, Inc.*; Order, DA 98-525 (rel. Mar. 19, 1998) (EchoStar alleged discrimination in price, terms and conditions of sale of programming but withdrew complaint after settlement with Cablevision).

³⁸ Petition for an Expedited Determination Regarding Authorization to Obtain Capacity on the Open Video System of RCN-BeCoCom, L.L.C., DA 97-1051 filed May 15, 1997.

³⁹ Reply Comments of Cablevision of Boston, Inc. dated December 29, 1997 filed in *Time-Warner Cable v. RCN-BeCoCom, L.L.C.*, DA 97-2333 filed October 31, 1997. As described below, the Cable Services Bureau has issued a decision directing RCN-BeCoCom to release some, but not all of the requested proprietary data.

- (vi) Intervening in a proceeding at the Massachusetts Department of Telecommunications and Energy ("DTE") alleging that RCN's OVS had been improperly subsidized by a subsidiary of Boston Edison Company;⁴⁰
- (vii) Filing a complaint at the DTE alleging that the pole attachment rates charged to Cablevision by a Boston Edison subsidiary affiliated with RCN's OVS project were excessive and in violation of law;⁴¹
- (viii) Intervening in another DTE proceeding involving Boston Edison's funding of its unregulated subsidiary;⁴²
- (ix) Filing of a Motion to Reopen Record and Stay Decision in a DTE proceeding which already had been resolved in RCN's favor;⁴³ and
- (x) Over a period of many months, denying RCN access to distribution wiring in certain Boston MDUs, in violation of the Commission's inside wiring rules.⁴⁴

The significance of these efforts lies not so much in their individual effect, but in their pervasive and repetitious pattern.⁴⁵

⁴⁰ Massachusetts DTE Docket No. 97-63.

⁴¹ Massachusetts DTE Docket No. 97-82.

⁴² Massachusetts DTE Docket No. 97-95.

⁴³ Massachusetts DTE Docket No. 97-63.

⁴⁴ Cablevision's substantial efforts to derail RCN's competitive initiatives is alleged by Cablevision to be in the interests of Boston Edison subscribers. Attached hereto as Exhibit C is an article describing the Boston situation from Boston Edison's perspective.

⁴⁵ Seemingly not content to impede RCN's competitive efforts alone, Cablevision and Time Warner apparently have enlisted the help of other cable industry participants. For example, the California Cable Television Association ("CCTA"), represented by the same law firm as Cablevision, largely repeated arguments previously made by Cablevision in opposing RCN's application for OVS certification in San Francisco. Similarly, the Pennsylvania Cable & Telecommunications Association, represented by the same law firm as Time Warner, filed comments on RCN's OVS application for Philadelphia, alleging that RCN's true purpose was to subvert the OVS rules to the detriment of RCN's competitors and the public at large. The Cable Services Bureau found little merit to either of these parties' comments. *Memorandum Opinion & Order, RCN Telecom Services of California, Inc., Certification to Operate an Open Video*

As mentioned above, both Cablevision and Time Warner, in the guise of prospective video program providers, have attempted to extract highly proprietary and confidential information from RCN concerning RCN's proposed Boston OVS system. In each case, the issue turns on whether Cablevision and Time Warner, as competing, in-region cable operators, are entitled to the requested data.⁴⁶ RCN's purpose in mentioning this issue here is not to lobby for a particular interpretation of the rule in question, but rather to demonstrate that OVS operators, as nascent competitors, are extremely vulnerable to the deep pockets of the entrenched cable monopolists. In this light, RCN urges the Commission to recognize that if it does not interpret its rules in a manner that encourages investment in the OVS concept, the success of the concept is rendered even less certain.

2. Inside Wiring and Competition Within MDUs

The NOI also seeks comments on the status of video delivery competition for and within MDUs.⁴⁷ The Commission correctly noted in the 1997 Competition Report that MDUs form an increasingly important market segment.⁴⁸ RCN has experienced substantial difficulties gaining

System, DA 98-1158, *rel.* June 15, 1998; *Memorandum Opinion & Order, RCN Telecom Services of Philadelphia, Inc., Certification to Operate an Open Video System*, DA 98-1155, *rel.* June 15, 1998.

⁴⁶ See 47 C.F.R. § 76.1503(c)(2)(v)(B). The Cable Services Bureau has not yet acted on Cablevision's request. With respect to Time Warner's efforts, a Cable Services Bureau decision directing RCN to produce some, but not all, of the sensitive, internal data. *Time Warner Cable v. RCN-BeCoCom, LLC*, Memorandum Opinion and Order, DA 98-1798 (Cable Serv. Bur., *rel.* April 28, 1998). RCN's petition for reconsideration, filed May 28, 1998, is pending. On July 24, 1998, Time Warner filed an essentially identical complaint concerning RCN's OVS system in New York City.

⁴⁷ NOI at ¶ 26.

⁴⁸ 1997 Competition Report at ¶ 129

entrance into MDUs in the Boston market as a result of a concerted campaign by the incumbent cable operator to make such entrance as difficult as possible. The Commission has gone to great lengths to resolve the many complex bottleneck issues related to inside wiring within MDUs, and has adopted regulations that attempt to successfully moderate the anticompetitive inclinations of incumbents.⁴⁹ In explaining these procedures, the Commission noted some of the exact problems currently faced by RCN, as described below:

[W]e believe that disagreement over ownership and control of the home run wire substantially tempers competition. The record indicates that, where the property owner or subscriber seeks another video service provider, instead of responding to competition through varied and improved service offerings, the incumbent provider often invokes its alleged ownership interest in the home run wiring. Incumbents invoke written agreements providing for continued service, perpetual contracts entered into by the incumbent and previous owner, easements emanating from the incumbent's installation of the wiring, assertions that the wiring has not become a fixture and remains the personal property of the incumbent, or that the incumbent's investment in the wiring has not been recouped, and oral understandings regarding the ownership and continued provision of services. Written agreements are frequently unclear, often having been entered into in an era of an accepted monopoly, and state and local law as to their meaning is vague. Invoking any of these reasons, incumbents often refuse to sell the home run wiring to the new provider or to cooperate in any transition. The property owner or subscriber is frequently left with an unclear understanding of why another provider cannot commence service. . . . The result, regardless of the cable operators' motives, is to chill the competitive environment.⁵⁰

In the City of Boston, the bulk of the video programming market consists of MDUs, and in those buildings Cablevision has demonstrated a deliberate policy of noncooperation with

⁴⁹ See *Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring, Report and Order and Second Further Notice of Proposed Rulemaking*, CS Docket No. 95-184 and MM Docket No. 92-260, 13 FCC Rcd 3659 (1997) ("Inside Wiring Order").

⁵⁰ *Id.* at ¶ 38 (footnotes omitted).

RCN. RCN is in the process of building in Boston and surrounding communities new fiber optic plant and has installed drops for its service in a large number of MDUs. RCN has taken many orders from current subscribers of Cablevision and has received permission from many MDU managers to provide such service. In many such buildings, however, RCN has found that the demarcation point, or the point at which a competitor may access the existing internal distribution wiring, is inaccessible because it is located behind sheet rock and the MDU managers will not permit RCN to bore through the sheet rock or to install molding to carry its wiring. The MDU managers also reject a complete overbuild of the wiring infrastructure due to the disruption to the building, which even if permitted, would cost RCN between \$500 and \$1,000 per unit.

The Commission's inside wiring rules anticipated that incumbent cable companies would be uncooperative with new entrants, and adopted rules to address the current situation faced by RCN.⁵¹ The rules also establish a competitor's right to access a subscriber's inside wiring at the demarcation point. If the wiring is readily accessible, this point is located within 12 inches of the subscriber's unit; if the wiring is not accessible, then the demarcation point is located wherever accessibility exists. In cases like this, the most practical way to achieve access to individual MDU units is to interconnect with the existing distribution wire at the incumbent's junction box, which typically is located in a closet on each floor of an MDU building.

⁵¹ See 47 C.F.R. § 76.802(j), requiring cable operators to take reasonable steps to ensure that an alternative service provider has access to the home wiring at the demarcation point, and 47 C.F.R. § 76.804 (b)(5), requiring all parties to cooperate to avoid disruption in service to subscribers to the extent possible.

Notwithstanding the Commission's inside wiring rules, Cablevision has recognized that it can significantly delay RCN's penetration of its heretofore captive market by refusing to cooperate with RCN. In so doing, Cablevision has adopted the clearly erroneous interpretation of the wiring rules that RCN must bore through sheet rock regardless of the MDU managers' objections. Cablevision also claimed to own and to have contractual rights to maintain the wiring, although it has not yet produced any evidence to support this claim. Given the fact that RCN and Cablevision will be head-to-head competitors in the Boston video marketplace for many years, RCN repeatedly has tried to develop a reasonable *modus operandi* with Cablevision under which either company could quickly and efficiently transfer a subscriber's service, without interruption or disruption to the subscriber. RCN has suggested using joint junction boxes, shared possession of keys and access to each other's junction box, coordinated appointments among the respective field staffs, and other similar reasonable measures. However, Cablevision has stubbornly refused all such suggestions, and instead simply insists that RCN bore through the sheet rock regardless of the MDU managers' objections. Indeed, Cablevision has informally admitted to RCN that its goal is simply to frustrate RCN's competitive efforts as long as possible.

3. Cable Operator Efforts to Influence Local Regulators

Cablevision, together with other entrenched monopolists, has opposed the initiation of competitive services in other areas as well. In Connecticut, for example, Cablevision, other cable operators, and the New England Cable Television Association, urged the DPUC to impose heavy initial obligations on a new entrant to match those being undertaken by the existing cable company. Fortunately, the DPUC rejected this suggestion, stating that "to allow an entrenched

and established incumbent with more than 80% of all potential customers to increase the requirements for any new entrant through a racheting up process of voluntary commitments would quickly raise the barriers to entry to such a level that competition could never begin."⁵²

C. Local Franchising and Rights-of-Way Issues

Another important element of deploying facilities-based video competition is securing permission to use the public rights-of-way. Section 653 of the Communications Act allows local regulators to control the use of rights-of-way by OVS operators⁵³ Under the Commission's implementing regulations, local regulators may impose conditions on an OVS operator for use of the rights-of-way, "so long as such conditions are applied equally to all users of the rights-of-way (i.e., are nondiscriminatory and competitively neutral)." (footnote omitted).⁵⁴ Thus, local governments may "impose normal fees associated with zoning and construction of an open video

⁵² See, e.g., *Application of SNET Personal Vision, Inc., Connecticut DPUC Docket No. 96-01-24, affirmed sub nom. New England Cable v. DPUC*, (Conn. Superior Ct. 1997, WL 604663) at p. 153 (concurring opinion). Cablevision also has used the so-called "level playing field" card in negotiating its recent renewal of its Boston franchise. That agreement allows Cablevision to demand a hearing from the city based on its unilateral claim that a new competitor is being treated better than Cablevision with respect to public obligations. The provision of the renewal agreement granting this option to Cablevision is based on the assertion (which must be contrary to fact) that it did not know it would be facing competition in the MVPD market when it agreed to certain undertakings and hence must reduce its commitments to its Boston subscribers. This is, of course, an issue for the municipal cable regulators to address in the first instance. It illustrates, however, that the incumbent's visceral reaction to new competition seems not to be to improve its offerings, but to attempt to raise the regulatory obstacles for the new entrant.

⁵³ *Implementation of Section 302 of the Telecommunications Act of 1996, Second Report and Order*, 11 FCC Rcd 18223 (1996) ("OVS Order"); *Third Report and Order and Second Order on Reconsideration*, 11 FCC Rcd 20227 (1996), *appeal pending sub nom. City of Dallas v. FCC*, (5th Cir. Case No. 96-60502); 47 U.S.C. § 573.

⁵⁴ OVS Order, 11 FCC Rcd at 18330.

system, so long as such fees was [sic] applied in a nondiscriminatory and competitively neutral manner."⁵⁵ Local requirements not in compliance with these provisions are preempted.⁵⁶ In addition to Section 653, the Communications Act addresses these situations in Section 253, which directs the Commission to preempt any state or local statute or regulation, or other state or local requirement, which prohibits or has the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.⁵⁷ Section 253(c) reserves to state and local governments the right to manage the public rights-of-way to require fair and reasonable compensation for such use on a competitively neutral and nondiscriminatory basis.⁵⁸

Notwithstanding these statutory and regulatory constraints on local governments, RCN has encountered difficulties in some markets in negotiating its OVS agreements or in getting the requisite local permits to use public rights-of-way. For example, some municipalities attempt to charge RCN fees for the use of the public rights-of-way which clearly exceed the reasonable costs of administering such rights-of-way, and which often exceed what the authority is charging existing utilities and other operators for essentially identical use. These are not new problems for local exchange carriers but until now have not become a major impediments to video

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 47 U.S.C. § 253.

⁵⁸ *Id.*, § 253(c).

programming providers. Nevertheless, the Commission has on numerous occasions exercised its preemptive powers.⁵⁹

It has been RCN's experience that many local governments are determined to charge RCN as high a right-of-way fee as possible, and some are of the view that the adoption of broad ordinances or franchises are appropriate as well. While it is understandable that local governments are compelled to attempt to raise revenue at every available opportunity, the imposition of substantial fees and widespread local regulation can be stultifying to an OVS operator's deployment of facilities-based video programming competition. Accordingly, while RCN does not at present seek Commission intervention in any particular matter, it urges the Commission to closely monitor local regulatory efforts which may have the effect of hindering the ability of OVS operators to compete with the cable industry.


V. CONCLUSION

The NOI seeks input concerning regulatory and other impediments to the full flowering of competition and for the identification of specific rules, policies or regulations that ought to be reexamined in light of current competitive opportunities. With the passage of time, RCN has acquired significant and real-world experience in the building, marketing and operating of OVS systems. RCN continues to believe that OVS offers one of the best opportunities for the development of viable facilities-based competition to the entrenched cable industry, and RCN is

⁵⁹ See, e.g., *Silver Star Telephone Co., Inc.*, 9 CR 617 (1997), recon. pending; *New England Public Communications Council*, 5 CR 625 (1966), reh. den., 7 CR 970 (1997); *Classic Telephone Co.*, 11 FCC Rcd 13082 (1996), appeal pending sub nom. *City of Bogue, Kansas v. FCC (D.C.Cir.)*; *Pittencrief Communications, Inc.*, 9 CR 1041 (1997). In each of these cases the Commission found state or local action which violated the standards of § 253 and therefore had to be preempted.

committed to investing in its certificated markets and to seek certification in other areas in the near future. Nevertheless, if OVS is to avoid a fate similar to that of the historically troubled wireless cable industry or video dialtone, the Commission must become a more active proponent of OVS by addressing the problems described in these comments. RCN therefore respectfully urges the Commission to more closely supervise the anticompetitive efforts of MVPD incumbents, as described herein, and take a more active role in fostering the growth of OVS.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Lawrence A. Walke".

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